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**Ref: Attorney General Opinion Request: Ownership of
Storm Sewer Facilities Constructed by Municipal
Utility Districts**

Dear Sir:

Numerous subdivision streets within Montgomery County have been constructed using the curb and gutter technique requiring the installation of underground storm sewer systems within the dedicated road right-of-ways. Due to the relatively large development costs of such facilities, in many instances financing has been obtained through the creation of Municipal Utility Districts (MUD) organized at least in part for purposes of storm water control. The construction of such facilities is sometimes undertaken directly by the MUD utilizing the proceeds of general obligation or revenue bonds, or in other instances using the proceeds of such bonds to purchase the facilities from the developer on a reimbursement basis.

Such storm sewer systems, in addition to receiving storm waters collected within the streets, provide the primary drainage system for storm water runoff from adjacent properties abutting the roadways in which the systems are placed. In some instances such storm sewer systems may discharge into major surface channels also constructed by the District. As such, these systems form an integral part of a drainage network with a considerably greater scope than that associated with drainage of the roadways alone.

Street dedication in such subdivisions is normally accomplished by plat dedication which is silent with respect to such facilities. In some situations, issues have arisen between the County and a MUD as to which entity is responsible for the maintenance of such facilities following the County's acceptance of street dedication and the incorporation of such streets into the County road maintenance system.

With respect to such circumstances, we ask the following questions:

- 1) May a MUD, created and continuing to exist under Chapter 54 of the Texas Water Code, divest itself of the ownership and maintenance responsibility for storm sewer systems placed by the District within a dedicated County road right-of-way when the system remains necessary to the control and abatement of storm water discharge within the District?
- 2) May such divestiture be made prior to the discharge of any bonded indebtedness incurred by the MUD in connection with the acquisition or construction of such facilities?
- 3) Is such divestiture automatically accomplished by way of plat dedication of street and road right of way?

We assume in connection with these questions that storm water control is a purpose for which the MUD has been duly organized and that the construction or acquisition of storm sewer systems by the MUD occurred prior to the County acceptance of streets or roads based upon a plat dedication. We further assume that such facilities remain necessary to the control and abatement of storm water discharge within the District.

The Texas Water Code provides in relevant part:

§54.012 — Purposes of a District

A district shall be created for the following purposes:

- 1) the control, storage, preservation, and distribution of its storm water and flood water, the water of its rivers and streams for irrigation, power, and all other useful purposes;
 - 2) the reclamation and irrigation of its arid, semiarid, and other land needing irrigation;
 - 3) the reclamation and drainage of its overflowed land and other land needing drainage;
 - 4) the conservation and development of its forests, water, and hydroelectric power;
 - 5) the navigation of its inland and coastal water;
 - 6) the control, abatement, and change of any shortage or harmful excess of water;
 - 7) the protection, preservation, and restoration of the purity and sanitary condition of water within the state;
and
 - 8) the preservation of all natural resources of the state.
- Added by Acts 1971, 62nd Leg., p. 775, ch. 84, Section 1.

§54.201 — Powers

- a) A district shall have the functions, powers, authority, rights, and duties which will permit accomplishment of the purposes for which it was created.
- b) A district is authorized to purchase, construct, acquire, own, operate, maintain, repair, improve or extend inside and outside its boundaries any and all works, improvement, facilities, plants, equipment, and appliances necessary to accomplish the purposes of its creation, including all works, improvements, facilities, plants, equipment, and appliances incident, helpful, or necessary to:

- 3) gather, conduct, divert, and control local storm water or other local harmful excesses of water in a district; (emphasis added)

§54.217 — Right to Use Road Right-of-Way

All districts are given right-of-way along and across all public, state, or county roads or highways, but they shall restore the roads crossed to their previous condition of use, as nearly as possible at the sole expense to the district.

We believe the above-cited provisions clearly establish a duty on the part of the MUD to maintain and repair storm water control facilities, including storm sewers, which have been constructed or acquired by it at the expense of the MUD. It also seems logical that the political subdivision that is created, taxes, and receives fees for a particular service, should provide that service and maintain ownership of the facilities to perform its stated function.

While noting Texas Water Code §54.214 authorizing the sale of surplus property or land "not needed by the district," we find no provision authorizing sale of facilities actively necessary to the accomplishment of a purpose for which a MUD has been duly organized. To the contrary, we note §54.215 and §54.218 of the Code authorizing Districts to lease facilities or enter into operation agreements providing, however, that no such lease or agreement shall have a term in excess of 40 years. Such a limitation is clearly consistent with a legislative prohibition on the sale or divestiture of such facilities by a District which would in turn defeat performance by the District of a purpose for which it was expressly created.

Based upon examination of the above-referenced authorities, we conclude that a District may not sell, convey, or otherwise divest itself of the ownership and maintenance responsibility in County road right-of-ways where such systems remain necessary to the control and abatement of storm water discharge within the District.

As indicated previously, in many instances the acquisition or construction of such facilities is financed through the sale of

bonds issued by the District. By way of example only, we cite certain provisions of a bond order dated April 28, 1980, and executed by the Board of Directors of Montgomery County Municipal Utility District № 15, a complete copy of which accompanies this opinion request. The bond order authorizes the issuance of \$1,500,000 in Water works and Sewer System Combination Unlimited Tax and Revenue Bonds for the purposes of "purchasing, constructing, acquiring, improving, and extending ..a drainage system for the drainage of lands within the District.."

Article X.A. Rates, provides in relevant part:

- A. Rates. The District shall fix and maintain rates and collect charges for the facilities and services afforded by the System, which will provide revenue sufficient at all times: 1) to pay for all administration, operation and maintenance expenses of the System; 2) to pay all outstanding indebtedness against the System, other than the Bonds or other special obligations, as and when same become due; and 3) transfer the balance of said revenues, if any, into the Bond Fund, as hereinafter set forth in this order. (emphasis added)

Article X.D. No Encumbrance or Sale of Properties, provides in relevant part:

- D. No Encumbrance or Sale of Properties. While any of the bonds issued by this order or any interest thereon remain outstanding, the District will not sell or encumber the physical properties of the system or any substantial part thereof, provided, however, that this shall not be construed as prohibiting the sale of such machinery or other properties or equipment which have been declared surplus or otherwise unsuited to the efficient operation of the system. Any agreement by the terms of which the District contracts with a person, corporation, municipal corporation or political subdivision to operate the system or to lease and/or operate all or a part of the system shall not be construed as a sale or encumbrance of the system. (emphasis added)

We understand such provisions to be typical of the terms and conditions of most such bond issues and to be incorporated as part of the bond covenants.

Without requesting any opinion with regard to the specific authority of Montgomery County MUD № 15, we do contend that such covenants support the general proposition that a District may not divest itself of facilities acquired or constructed with bond proceeds prior to the discharge of any bonded indebtedness incurred in connection with such acquisition or construction. Accordingly, we conclude the answer to our second question is negative where such conveyances would violate the terms of any applicable bond covenant. We specifically conclude that the attempted conveyance

of such facilities to a County would be invalid during the term of any outstanding bonded indebtedness similarly incurred.

Finally, with regard to the third question we have posed, we conclude that plat dedication of streets and roads, standing alone, is insufficient to divest a MUD of ownership or maintenance responsibility for storm facilities placed in county road right-of-ways.

In connection with subdivision road dedication, Montgomery County requires the following language to appear on the face of plats tendered for filing approval:

I(we), (Name(s) of owner(s)), owner(s) of the property subdivided in the above and foregoing map of the (Name of Subdivision) do hereby make subdivision of said property, according to lines, streets, lots, alleys, parks, building lines, and easements therein shown, and designate said subdivision as (Name of Subdivision) in the _____ Survey, Montgomery County, Texas; and dedicate to public use, as such the streets, alleys, parks, and easements shown thereon forever; and do hereby waive any claims for damages occasioned by the alteration of the surface of any portion of streets or alleys to conform to such grades; and do hereby bind myself (ourselves), my(our) heirs and assigns to warrant and forever defend the title to the land so dedicated.

Underground storm sewer facilities are not mentioned in our plat dedication language. Naturally, for there to be a conveyance of storm sewer facilities by way of plat dedication, there must be an intentional conveyance and acceptance of the facilities.

The concept of implied dedication is dealt with in The City of Houston v. Lakewood Estates, Inc., 429 S.W.2d 938 (Tex. App.-Houston [1st Dist.] 1968, no writ). Lakewood involves the annexation of a subdivision by the City of Houston. The City claimed that there was an implied dedication of water and sewer lines. The developer who installed the water and sewer lines claimed the lines had not been dedicated and therefore ownership was retained by them. The focal point of the case was directed towards the intent of the developer. The Court found sufficient evidence to support a finding that there was no intention to dedicate the lines to the public and that title to the lines were therefore retained by the developer. Lakewood involved a city rather than a county, and a private corporation rather than a MUD; however, it did establish that "intent," is an important question of fact in cases involving implied dedication. Furthermore, the intent to accept the dedication would seem equally as important as the intent to convey.

In our example, Montgomery County MUD # 15 reflects the storm sewer facilities as an asset on its financial statements. The bond liability incurred to construct this system is also reflected on

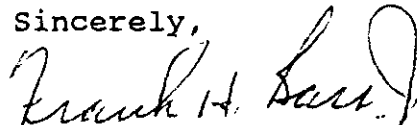
the financial statements; therefore, there is no indication that a portion of the system was conveyed to another entity. If the county owns and is responsible for part of the system, the question arises, should it receive part of the applicable tax revenue and fees received by the municipal utility district?

Underground storm sewer facilities run in and outside of the public road right-of-way. If plat dedication transferred ownership of storm sewer facilities lying beneath public road right-of-ways from a municipal utility district to the county, there would still be a major portion of the system owned and maintained by the municipal utility district. The divided ownership of the system would present problems; such as ultimate control of the system, and the obvious inefficiency of two political entities owning and maintaining parts of the same facility. It should be noted that fresh water and sanitary sewer facilities are also located in and outside the public road right-of-way, yet there has been no suggestion that those facilities are partially owned by the county.

In conclusion, Montgomery County has never maintained storm sewer facilities and has never claimed ownership of them through right-of-way dedication.

Your prompt consideration of these questions is appreciated.

Sincerely,



Frank H. Bass, Jr.
County Attorney

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Enclosure